

## HUMAN SERVICES BOARD

# INTRODUCTION

## FINDINGS OF FACT

Prior to the Department's actions to place petitioner on the registry, petitioner coached sports teams on which his children played, went on overnight activities with his

children such as cub scout trips, and mentored other children.

2. The case involves K.D., petitioner's oldest child who was fifteen years old at the time of the incident. The incident took place late on the evening of January 14, 2008 when K.D. and her siblings were staying with petitioner. The incident involves an argument between K.D. and petitioner in which petitioner flung his left hand out backhanding K.D. after petitioner's right hand was pinched between the chair K.D. had used and the bookcase. The bookcase was wooden with a shelf at about the same level as the back of the chair. The petitioner claims that his action was a reflexive response. The details will be more fully spelled out below.

3. On January 15, 2008, K.D. was asked about a bruise on her face by one of her teachers. K.D. explained she was in a fight with her brothers and hit her face on the door. The teacher sent K.D. to the school nurse. K.D. first told this story to the school nurse but later told the nurse that her father hit her. A guidance counselor was called in. The guidance counselor reported the incident to the Department on January 15, 2008.

4. S.M. is an investigator with the Department. She has worked for the Department since 2004. S.M. testified at hearing.

S.M. met K.D. on January 16, 2008 in the guidance office at K.D.'s school in the presence of a guidance counselor. S.M. observed a bruise across the bridge of K.D.'s nose and under her right eye. S.M. described the bruise as a dark purple bruise, not red, and with no abrasions. She stated that part of the white of K.D.'s right eye was cloudy pink. S.M. did not take a picture of the bruise. S.M. spoke to K.D. this one time; she does not know how long the bruise lasted.

S.M. spoke with K.D.'s mother by telephone on January 18, 2008 and spoke with petitioner by telephone on January 31, 2008.

S.M. testified that petitioner explained that he went to K.D. to tell her to go to bed. They had a disagreement. Petitioner saw his fiancée's art supplies under the chair; K.D. was not allowed to use these supplies. They argued about the art supplies. Petitioner also saw food on the book shelf. Their argument continued. K.D. kicked the chair causing petitioner's hand to be pinched. He turned around and his left hand backhanded K.D.'s face. He described the

back hand as being "pretty hard". Petitioner said he had not seen an injury to K.D. but that he had not really seen her after the incident.

S.M. attended the review hearing but does not recall what petitioner said at the review hearing.

5. S.M. determined that the petitioner did not pose a risk to K.D. and recommended that the Department's case be closed in March 2008. The Department's case was closed.

The Department did substantiate abuse; the petitioner appealed the decision through a review and then this fair hearing.

6. S.D. is the ex-wife of petitioner. She testified at fair hearing. S.D. and petitioner have lived apart for approximately three years and have been divorced for two years. They have joint custody of their three children.

S.D. was telephoned by a guidance counselor from K.D.'s school on January 15, 2008 to inform her that they were referring petitioner to the Department for possible child abuse. S.D. was told that petitioner hit K.D. She described her reaction as shocked because the allegation was totally out of character for petitioner. S.D. was asked if K.D. could stay with her. She agreed and, at hearing, clarified that the children were scheduled to return to her that day.

S.D. saw K.D. after school that same day. S.D. described K.D.'s bruise as located under her right eye and across the bridge of the nose. She described the bruise as light and not purple or angry. The bruise was gone in three days.

S.D. spoke with K.D. during a walk that day. K.D. was upset and crying; K.D. was saying that she was afraid her dad would be upset with her and that he could get into trouble. S.D. told K.D. it was not her fault and tried to reassure her that her father loved her and that it must have been an accident. K.D. said no and that her father punched her. When asked what the worst part was, K.D. said the lack of an apology.

After the incident, S.D. was asked to keep K.D. with her by S.M. until things settled down. According to S.D., K.D. wants to see her father. Within a few weeks of the incident, K.D. began to spend time with petitioner. S.D. has no concerns about K.D. or their other children spending time with the petitioner.

S.D. spoke to petitioner on the Friday following the incident because K.D. would not be joining her brothers at the petitioner's home. According to S.D., petitioner did not know that the Department was involved. S.D. described

petitioner's reaction as shocked. She does not remember his exact words but that he mentioned that his fingers were pinched.

The petitioner called her after receiving written notification that he was being substantiated for abuse. S.D. described petitioner as upset including being upset that he would not be able to volunteer for his children's activities or mentor children. S.D. testified that she told him she was "floored" because this was an isolated incident.

S.D. has spoken with both petitioner and K.D. about the incident. Based on these conversations and her knowledge of both petitioner and K.D., her understanding of the incident is that petitioner's right hand was pinched between the chair and bookshelf, that he pushed away, and struck K.D.

7. K.D. testified at the hearing. She explained that she was watching television and studying for a test in the playroom on Monday evening. Her brothers had gone to bed at 9:00 p.m. It was after 10:00 p.m. Her bedtime is usually 10:00 p.m.

She was sitting in an upholstered yellow chair whose back was to a bookshelf. She used another yellow chair to place her feet on. The yellow chair was fluffy but the top of the chair was a bit hard.

The petitioner came into the playroom and told K.D. to go to bed. They argued for a few minutes because she did not want to go to bed. She does not remember arguing about art supplies that evening.

K.D. said the petitioner tipped her out of the chair. She sat down again in the chair and heard the petitioner yell "ouch". When she sat back into the chair, the petitioner's right hand was pinched between the chair and the bookshelf. She testified that his other hand flung out and hit her face. K.D. said she fell to the floor then got up and went to bed. K.D. described the incident happening "bam, bam, bam" or very quickly.

When K.D. went to school the next morning, her friends asked about the bruise. K.D. told her friends and then a teacher that she hit her face on a door when fighting with her brothers. Her teacher did not believe her and sent her to the nurse. K.D. first told the nurse the story about her brothers but then said the petitioner hit her. Arrangements were made for her to talk to a guidance counselor. The guidance counselor told her that DCF would be called. K.D. said she made up the story about her brothers because she wanted to protect her father.

She said there was bruising for a couple of days on the right side of her face.

K.D. has stayed with the petitioner since the incident. There has been no period in which she did not want to see him. She thought the petitioner's actions were out of the ordinary and not intentional. She explained that when petitioner is angry with her, he yells.

8. Petitioner testified about the incident with his daughter, K.D. On January 14, 2008, K.D. was in the middle of exams and had a half-day of school. Petitioner stated that he asked her to study on a number of times but she refused to study.

Petitioner explained that he is very strict about bed-times on school nights. He noticed that K.D. was not in bed after 10:00 p.m. and went to the family room where he found K.D. sitting in a yellow chair watching television with her feet up on another yellow chair. He asked her to go to bed. He testified that K.D. was acting suspicious like she wanted to hide something from him. He came to the front of the chair in which K.D. was sitting and saw his fiancée's art supplies under the chair. K.D. was not allowed to use these supplies without permission.



K.D. had moved from the chair and was near the television facing the chair. Petitioner testified that he saw some food (wrappers, orange rind) on the bookcase behind the chair. He put his right hand on the back of the chair. According to petitioner, K.D. lunged at the chair and kicked the chair back which pinched his right hand between the chair and bookcase. Petitioner said the yellow chair has fabric over wood on the back. His hand hurt and he said "ow", turned counterclockwise and his left hand shot out and backhanded K.D. on her face. Petitioner testified that it happened in a split second. Petitioner testified that K.D. went to the ground. He said he did not think she would go to bed so he left the room.

The petitioner testified that he saw K.D. the next morning and walked her out to the bus stop. He testified that he does not remember seeing any bruising.

Petitioner testified that he did not intentionally hit K.D. but that his actions were a reflex upon his right hand being pinched.

9. Petitioner offered testimony from two friends, T.H. and A.G-F. Both testified that they had no fear that petitioner would harm their children or any children.

ORDER

The Department's decision to substantiate abuse is reversed.

REASONS

The Department for Children and Families is required by statute to investigate reports of child abuse and to maintain a registry of all investigations unless the reported facts are unsubstantiated. 33 V.S.A. §§ 4914, 4915, and 4916.

A major purpose of the child abuse registry is to protect children. 33 V.S.A. § 4911. The registry is a tool that employers and volunteer groups can use to prevent a substantiated person from working with children in either a paid or volunteer capacity. The substantiation statute needs to be read with this goal in mind.

The statute has been amended to provide an administrative review process to individuals challenging their placement in the registry. 33 V.S.A. § 4916a. If the substantiation is upheld by the administrative review, the individual can request a fair hearing pursuant to 3 V.S.A. § 3091. Upon a timely request for fair hearing, the Department will note in the registry that an appeal is pending. 33 V.S.A. § 4916(a).

The pertinent sections of 33 V.S.A. § 4912 define abuse as follows:

(2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. An "abused or neglected child" also means a child who is sexually abused or at substantial risk of sexual abuse by any person.

(3) "harm" can occur by:

(A) Physical injury or emotional maltreatment;

. . .

(6) "Physical injury" means death, or permanent or temporary disfigurement or impairment of any bodily organ or function by other than accidental means.

There is no dispute that the petitioner's back-handed slap caused bruising on K.D.'s face. However, petitioner disputes that his actions on January 14, 2008 rise to the level of abuse contemplated in 33 V.S.A. § 4912. In addition, petitioner argues that his actions were accidental.

The Board looks at the totality of circumstances in determining whether a person should be placed on the registry. In Fair Hearing No. 10,687, the Board found that harm encompasses a wide range of events but does not require a finding of abuse in each and every case. The Board considers the impacts upon a child's physical health,

emotional health and welfare as well as continued risk to the child when assessing cases.

Bruising alone is not necessarily sufficient to substantiate abuse. For example, in Fair Hearing No. 10,687, the parents spanked their child causing a bruise. The Board reversed the substantiation decision because the parents were caring parents who normally did not use spanking for discipline, would not do so in the future, and the child was not at risk of harm. See Fair Hearing No. 19,112 (petitioner grabbed child by hair and bumped child's head against the wall during a crisis at a residential care facility) and No. 21,194 (child sustained scratches when parent restrained child who was physically acting out).

In contrast, the Board has affirmed substantiation of abuse when there is a history of harm or egregious action. In Fair Hearing No. 10,419, the evidence of a bruise in conjunction with a history of hitting demonstrated that the child was being harmed. See Fair Hearing No. 10,543 (daycare worker bit child with bruising evident more than one week after the incident), Fair Hearing No. 11,444 (bruises and welts caused by hitting the child with a belt and other objects), and Fair Hearing No. 12,309 (bruises from intentional and repeated spankings with a belt).

On the night of January 14, 2008, the petitioner and K.D. argued when K.D. refused to go to bed. During this argument, petitioner saw art supplies K.D. was not allowed to use and food waste on the bookcase behind a yellow upholstered chair that K.D. used. K.D. was not sitting in the chair when petitioner reached behind the chair to the bookcase while standing to the side of the chair. K.D. was standing by the television. While petitioner was reaching in, K.D. forced the chair back pinning petitioner's right hand between the back of the chair and the wooden shelf. Both petitioner and K.D. testified that petitioner said "ouch" or "ow" because of the pain. Both testified that the pinning of petitioner's right hand and subsequent slap happened instantaneously.

Petitioner did not act intentionally when his left arm flung out and hit K.D.'s face. He was not acting to discipline her. The Department found that petitioner does not pose a threat to K.D.

The Department alleged that petitioner used a closed fist to intentionally strike K.D.; however, the testimony at hearing does not support this allegation. The testimony supports a finding that K.D.'s bruises were caused by

accidental means. Under the statute, physical injury by accidental means is not considered "harm".

In looking at claims of abuse "by other than accidental means", the Board iterates that each case is assessed on its merits. Fair Hearing No. 17,588 and No. 21,194. Rivard v. Roy, 124 Vt. 32 (1963); State v. Koch, 171 Vt. 515 (2000); and Mullin v. Flood Brook Union School District, 173 Vt. 202 (2001).

In Fair Hearing No. 17,588, the Board adopted the definition of "gross negligence" used in Rivard, supra. In particular, the Board stated on page 19 of Fair Hearing No. 17,588 that gross negligence or reckless behavior is whether:

...the act (a) demonstrated a failure to exercise a minimal degree of care or showed an indifference to a duty owed to another and (b) was not merely an error of judgment, momentary inattention or loss of presence of mind.

The Department's policies echo this approach; DCF Policy 56 states "physical injury is not abuse when the injury occurred accidentally, there was no intention to cause harm or a reasonable person could not have predicted harm".

When petitioner's right hand was painfully pinched, his left arm shot out as he turned counterclockwise with his left hand backhanding K.D.'s face. The sequence occurred in a second. Petitioner's movements were a reflexive reaction.

This is an unfortunate incident. Petitioner did not mean to harm K.D. This is an isolated incident. Both petitioner and K.D. have been negatively impacted by the Department's decision to substantiate.

Although one act can support substantiation, this case does not rise to that level. The Department found that petitioner did not pose a risk to K.D. and closed their case. Looking at the totality of the circumstances, the Department has not shown by a preponderance of evidence that petitioner's actions on January 14, 2008 rise to the level of abuse contemplated by the statute. Accordingly, the Department's decision is reversed. 3 V.S.A. § 3091(d); Fair Hearing Rule No. 1000.4D.

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